No. 8095

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF COEUR D'ALENE, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; ALFRED SWANSON, JOHN FREDERICK, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, RICHARD WEEKS, S. H. McEUEN and J. H. POINTNER, Members of the City Council of said City of Coeur d'Alene; and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division

BRIEF OF APPELLANTS, CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION, CITY OFFICERS AND MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO.

W. B. McFARLAND

C. H. POTTS

Attorneys for Appellants, City of Coeur d'Alene, Idaho, a muncipal corporation, City Officers and Members of the City Council of said City of Coeur d'Alene, Idaho.

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STATEMENT OF THE CASE

This is an appeal from a decree made and entered on the 9th day of September, A. D., 1935, by the United States District Court for the District of Idaho, Northern Division, enjoining appellants (defendants in the Court below) from consummating a loan and grant from the Federal Emergency Administration of Public Works to the City of Coeur d'Alene, Idaho, for the construction of a municipal electric power generating plant and distribution system in said City, under the provisions of Sections 201, 202 and 203 of Title II of The National Industrial Recovery Act (Sections 401, 402 and 403, Title 40, U. S. Code).

Said decree permanently enjoined the defendants, City of Coeur d'Alene, a municipal corporation, and the Officers and Members of the City Council of said City from making or entering into, or consummating any contract with the Federal Emergency Adminstration of Public works, or with the United States of America, for the purpose of providing for, or in furtherance of the construction of a municipal electric power generating plant and distribution system in the City of Coeur d'Alene; and from financing or attempting to finance any such municipal electric generating plant or distribution system in the City of Coeur d'Alene with funds received from the Federal Emergency Administration of Public Works, or from the United States, whether in the form of loans or gifts or grants; and from issuing, pledging, delivering or selling to the Federal Emergency Administration of Public Works, or the United States of America, any bonds of the City issued under Ordinance No. 713, referred to in the Complaint (which Ordinance provided for the issuance of bonds and for submission of the incurring of the indebtedness to the voters); and from accepting, using or applying any moneys, the proceeds of any such loan or gift or grant from the Federal Emergency Administration of Public Works, or from the United States of America, and from proceeding with the issuing, pledging, selling or delivering any bonds of said City to the Federal Emergency Administration of Public Works, or to the United States of America.

Said decree permanently enjoined the Defendant, Harold L. Ickes, as Federal Emergency Administrator of

Public Works from loaning or giving or granting to the City of Coeur d'Alene, any public moneys of the United States to be used in the construction of a municipal electric plant for the generation and distribution of electricity within said City, and from entering into any contract with the said City or its officers, to purchase any municipal bonds referred to in the Complaint, or provided for by said Ordinance No. 713, or from making any loan, gift or grant of moneys of the United States of America to said City for the purpose of the construction or assisting in the construction of a municipal electric power generating or distribution system.

The practical effect of the decree was to enjoin the City of Coeur d'Alene on the one hand and the Federal Emergency Administrator of Public Works on the other from carrying out the terms of the loan and grant agreement which had been executed by the City and was about to be executed by the Federal Emergency Administrator of Public Works when the temporary injunction was issued in this case. Said loan and grant agreement is attached to the Amended Bill of Complaint marked, "Exhibit D", and is set forth in the Transcript of the Record at pages 104 to 134 inclusive. Its terms and provisions are as follows:

Part one provides that subject to the terms and conditions stated, the Government will by loan and grant not exceeding in the aggregate, the sum of $650,000, aid the City of Coeur d'Alene in financing the project consisting substantially of the construction of a water sys-

tem including sinking wells, installing pumps, and a distributing system for water service; also a Diesel engine generating plant and an electric distribution system, all pursuant to the City's application, Title II of The National Industrial Recovery Act, and the Constitution and statutes of the State of Idaho.

The financing is by means of a loan (through the sale of bonds to the Government) and a grant. The City agrees to sell and the Government agrees to buy in the principal amount thereof plus accrued interest $504,000 of the bonds to be issued by the City bearing interest at the rate of 4% per annum payable semi-annually from date until maturity, less such amount of the bonds, if any, as the City may sell to purchasers other than the Government.

The Government will make and the City will accept, whether or not any or all of the bonds are sold to other purchasers, a grant in an amount equal to 30 percentum of the cost of labor and materials employed upon the project. If all of the bonds are sold to purchasers other than the Government, the Government will make the entire grant by payment of money. In no event shall the grant be in excess of $175,000.

The City is required to deposit the proceeds of the sale of bonds and the grant in construction accounts, and to apply them solely toward the cost of construction of the project, or to the extinguishment of the bonds or interest. The City is required to commence the construction of the project upon receipt of the first bond payment, and

continue it to completion with all practicable dispatch in an efficient and economical manner at a reasonable cost and in accordance with the provisions of the agreement, plans, drawings, specifications and construction contracts which shall be satisfactory to the Administrator and under such engineering, supervision and inspection as the Administrator may require.

The Government shall be under no obligations to pay for any of the bonds or to make any grant if the Administrator shall not be satisfied that the City will be able to complete the project for the sum of $650,000, or that the City will be able to obtain in a manner satisfactory to the Administrator, any additional funds which the Administrator shall estimate to be necessary to complete the project.

The Government is not required to purchase any bonds unless the City adopts a rate and bond ordinance satisfactory to the Administrator in form, sufficiency and substance, such ordinance to provide among other things that no donations, taxes, depreciation charges or any other items of expense except normal operating expenses and maintenance, together with water, lighting and power line extensions shall be charged against the revenues of the project, and that all municipally used water and electrical energy shall be paid for at current selling rate schedules, except water used in fighting fires, and a reasonable rate shall be paid for hydrant rental, all such payments to be made as the service accrues, from the general funds of the City into the funds of the City's

water and electrical Departments.

The City covenants that at such time as electrical energy shall be made available from the Government power project at Grand Coulee, State of Washington, at rates such that the costs thereof to the City shall be less than the cost thereof delivered from the Diesel engine generating plant to be constructed as a part of the project, the City will thereupon and thereafter cease active operation of such Diesel engine power plant and place it on a stand-by basis only, and will purchase all of its electrical energy requirements from the said Governmental power project at Grand Coulee, Washington. This covenant is made a material consideration for the execution of the agreement on behalf of the Government and for the loan and grant to be made thereunder.

Part two relates to construction work, wages and hours of labor, and in consideration of the grant, the City covenants that all work on the project shall be subject to the rules adopted by the Administrator to carry out the purposes and control the administration of the act. Convict labor is prohibited and no materials manufactured or produced by convict labor shall be used on the project. The thirty hour week is established as the basis of employment with just and reasonable wages sufficient to provide a standard of living in decency and comfort, and in no event, to be less than the minimum wages prescribed by the Administrator, in the zone or zones in which the work is to be done. The maximum of human labor shall be used in lieu of machinery wherever

practicable and consistent with sound economy and public advantage. All construction work on the project shall be done under contract, provided, however, that the prices in the bids are not excessive. The City reserves the right to apply to the Administrator for permission to do all or any part of the project on a force account basis.

The agreement shall be governed by and be construed in accordance with the laws of the state.

The validity of the loan and grant to be made pursuant to the provisions of the loan and grant agreement was challenged by the appellee as plaintiff in the Court below, by its amended Bill of Complaint on several grounds most of which were sustained by the findings of the lower Court in its Findings of Fact and Conclusions of Law. The decree is based upon these findings which in legal effect substantially are as follows:

First. That appellee will suffer a direct injury from the making of the loan and grant and the construction of a competing municipal electric plant in the City of Coeur d'Alene, and is entitled to challenge the constitutionality of Title II of The National Recovery Act. (R. p. 258-261).

Second. That Congress has no power to make the loan and grant of public moneys of the United States to the City of Coeur d'Alene for the purpose of constructing a local municipal electric plant in the exercise of the general taxing power of the United States because:

(a) Article I Section 8 Clause 1 of the Constitution

of the United States does not authorize Congress to levy taxes or appropriate moneys for objects not within the enumerated powers expressly delegated to the Federal Government.

(b) That power to tax and appropriate public moneys of the United States must be restricted to objects which are national, general and Federal in character, and not mere matters of local benefit.

(c) The proposed construction of a local generating plant and distribution system in the City of Coeur d'Alene is not for any public use or object affecting the general welfare of the United States. (R. p. 258-259).

Third. That the loan and grant is unauthorized, unlawful and in violation of the Tenth Amendment to the Constitution of the United States. (R.p.260).

Fourth. That the expenditures contemplated and proposed by the city constitute the incurring of an indebtedness or liability in violation of Article 8, Section 3 of the Constitution of the State of Idaho. (R.p.260-261).

Fifth. That the use of public funds in the construction of a competing electric generating plant and distribution system within the City of Coeur d'Alene as proposed, will result in irreparable damage to the appellee, and will amount to the taking of its property without due process of law in violation of the Fifth Amendment and Section One of the Fourteenth Amendment to the Constitution of the United States.

Sixth. That the conditions attached to the making of the loan and grant and the basis of selection for making the same violate the Tenth Amendment to the Constitution of the United States.

Seventh. That the city did not provide service to a large area within the City of Coeur d'Alene although the ordinance submitting the question of the authorization of the bond issue and the application to the Federal Emergency Administration of Public Works, contemplated an electric plant and distribution system adequate and so constructed as to serve all sections of the city, and said Administration required as a condition to the making of any loan or grant, that the system to be constructed should be adequate to serve and should serve all sections of the city (R.p.249).

Eighth. That the plant to be constructed with the funds obtained from the loan and grant is not adequate to care for the load in said city; the cost of an adequate plant and an adequate distribution system would exceed the amount of the funds provided. (R.p.250-251).

The Court admitted evidence with respect to the adequacy of the plant and distribution system proposed to be constructed by the City and with respect to the cost of installing an adequate Diesel engine electric generating plant and distribution system, to which evidence the appellants objected on the ground that it was an attempt to interfere with the administrative functions of the executive departments of the Government.

The witness, Lester R. Gamble, testifying for appellee, was permitted to testify that the cost of extending the distribution system into a certain area of the City which was left out as shown on the map attached to the original application of the City of Coeur d'Alene to the Federal Emergency Administration of Public Works for a loan and grant, admitted in evidence as "Plaintiff's Exhibit 1" including overhead and contractor's profit is $27,534. (R.p.280).

The same witness was permitted to answer the following question:

"Q. What did you find with respect to whether or not the city residences could be served by services provided for it?"

The appellants objected to this question on the ground that it is immaterial and an attempt to interfere with the administrative discretion of the executive department, and that the question of the capacity and sufficiency of the proposed plant is left to the discretion, in the first instance, of the City that is going to build it, and under the proposed arrangement, to the Federal Emergency Administration of Public Works. This objection was over-ruled to which ruling the appellants excepted, and their exception was allowed and the witness was then permitted to testify with respect to the details of the distribution system required in the City of Coeur d'Alene as compared with the system provided in the application of the City for a loan and grant. The answer of the witness is in such detail that it is impracticable

to set it out in full, but it appears at Pages 280, 281 and 282 of the Record.

The witness, Lee Schnietter testifying for appellee, was permitted to testify that an adequate Diesel engine generating plant would cost the sum of $368,790, based on 100% of the load, and $297,200 to serve 80% of the load as shown by his testimony (R.p.367), by his tabulation marked "Plaintiff's Exhibit No. 49", (R.p.527-528), which he testified was an estimate of the cost of installing a reasonably operative Diesel engine plant to generate power for the 80% load and the 100% load. (R.p.363).

The appellants had objected to the introduction of any evidence respecting the costs of construction and it was agreed in open Court that the objection as to the immateriality of all evidence going to the cost of construction of the plant should go to all such testimony. (R. p. 361-362).

The figures used by this witness in making his estimate of the costs of the plant were based on prices in November 1934. (R.p. 375).

The witness, Lester R. Gamble, testifying for appellee was permitted to testify that the cost to construct a distribution system such as he had described and had testified was necessary in the City at this time to serve 100% of the consumers would be $195,005, which costs were based on prices in November 1934. (R.p. 285).

The engineer's report contained in the application of the City of Coeur d'Alene to the Federal Emergency Administration of Public Works for a loan and grant,

"Plaintiff's Exhibit No. 1", was a preliminary plan and was not prepared as a final plan and detailed specifications.

The witness, Ernest E. Porter, testifying for appellants testified that he was working directly under the supervision of Mr. Wood (the City's engineer) in designing the electrical distribution system in the City of Coeur d'Alene, and was in direct supervision of the distribution and street lighting system in the preparation of that report. He then testified:

"This report was prepared to accompany the application for the loan and grant and for the use of the Public Works Administration, and to give the Public Works Administration a clear understanding of what would be required in the way of labor, and a general plan of distributing electricity to the consumers of the City of Coeur d'Alene. It was a preliminary plan, a skeleton plan only, and was not prepared as a final plan and detailed specifications. (R.p.390-391).

The witness, Paul W. Dexheimer, testfying for appellants, testified as follows:

"The purpose of the engineer's report was prepared solely for use with this application. It is customary to use that form of engineer's report or estimate. It was not prepared as the final plan or detailed specifications of the project. (R.p.415).

"The proceeding for the construction of an electrical plant in Coeur d'Alene has not reached the stage for the

preparing of the final plans and detailed specifications. The plans and cost estimates provided in the engineering report attached to the application, "Plaintiff's Exhibit 1" are not sufficient from an engineering standpoint, for the calling for bids for construction. The plans and specifications are so sketchy in detail that I don't think any contractor would dare to take the risk of making a bid on them. They would be insufficient for him to understand what was to be done, and do not provide any details." (R.p.416).

Prices were lower in 1933 when the engineer's report attached to the application of the City of Coeur d'Alene to the Federal Emergency Administration of Public Works was prepared by Mr. Wood, than they were in November 1934. (R.p.377), Mr. Wood's figures were based on prices in 1933 while appellee's cost estimates were based on prices in November 1934, after the N.R.A. Code was in effect. Prices were increased after the Code went in effect. (R.p. 375).

A statement issued by the Federal Emergency Administration of Public Works, known as Release No. 989 contains the following:

> "Municipal or local publicly owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes."
>
> * * * * * * * *
>
> "However, we make it a practice before approv-

ing the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating." (R.p. 54-55).

In a letter to the Mayor of Coeur d'Alene, the Federal Emergency Administration of Public Works stated in effect that the rate ordinance required as a condition of the loan should fix rates approximately 20% below existing rates and should provide that such rates will be made available by the municipal plant, and will not be increased until certain conditions are proved to the satisfaction of the Administrator. (R.p. 67-68).

The acquisition of the water system is not involved in this case. (R.p. 29).

SPECIFICATION OF ERRORS

Appellants specify the following particulars in which the decree is erroneous and wherein the Court erred in entering the decree, to-wit:

1. The decree is contrary to law.

2. The Court erred in finding and deciding that appellee will suffer a direct injury from the making of the loan and grant to the City of Coeur d'Alene by the United States, and the construction of a competing municipal electric plant in the City of Coeur d'Alene, and is entitled to challenge the constitutionality of Title II of the National Industrial Recovery Act.

3. The Court erred in finding and deciding that Congress has no power to make the loan of public moneys

of the United States to the City of Coeur d'Alene, for the purpose of constructing a local municipal electric plant in the exercise of the general taxing power of the United States.

4. The Court erred in finding and deciding that Article I Section 8 Clause 1 of the Constitution of the United States does not authorize Congress to levy taxes or appropriate moneys for objects not within the enumerated powers expressly delegated to the Federal Government.

5. The Court erred in finding and deciding that the power of Congress to tax and appropriate public money of the United States must be restricted to purposes which were national, general and Federal in character, and not mere matters of local benefit.

6. The Court erred in finding and holding that the proposed construction of a local generating plant and distribution system in the City of Coeur d'Alene is not for any public use or object affecting the general welfare of the United States.

7. The Court erred in finding and deciding that the loan and grant is unauthorized, unlawful and in violation of the Tenth Amendment to the Constitution of the United States.

8. The Court erred in finding and deciding that the expenditures contemplated and proposed by the City constitute the incurring of an indebtedness or liability in violation of Article 8, Section 3 of the Constitution of the State of Idaho.

9. The Court erred in finding and deciding that the use of public funds in the construction of a competing electric generating plant and distribution system in the City of Coeur d'Alene as proposed will result in irreparable damage to the appellee, and will amount to the taking of its property without due process of law in violation of the Fifth Amendment and Section One of the Fourteenth Amendment to the Constitution of the United States.

10. The Court erred in finding and holding that the conditions attached to the making of the loan and grant and the basis of selection for making the same violate the Tenth Amendment to the Constitution of the United States.

11. The Court erred in finding and holding that the City did not provide service to a large area within the City of Coeur d'Alene; that the plant to be constructed with the funds obtained from the loan and grant is not adequate to care for the load in said city; and that the cost of an adequate plant and an adequate distribution system would exceed the funds provided therefor.

12. The Court erred in finding that an adequate Diesel engine generating plant for the service of the entire city would cost the sum of $368,790 computed as of November 1934, and to serve 80% of the load of said City would cost $297,200; that an adequate distribution system for said city would cost the sum of $195,005 as of the month of November 1934; and the total cost of installing an adequate Diesel electric generating plant and distribution system for the City of Coeur d'Alene serving 100% of

the consumers is the sum of $563,795, and to serve 80% of the load would cost $472,424.

13. The Court erred in admitting evidence with respect to the cost of extending the distribution system into the so-called omitted area over the objection of the appellants, and in permitting the witness, Lester R. Gamble, testifying on behalf of appellee to testify that "the cost of extending the distribution system into the area which was left out, marked in pink on the map, including overhead and contractor's profit is $27,534.

14. The Court erred in over-ruling the objection of appellants to the question propounded to the witness, Lester R. Gamble, testifying on behalf of appellee, "Q. What did you find with respect to whether or not the city residences could be served by services provided for it?", and in permitting said witness to testfy with respect to the details of the distribution system required in the City of Coeur d'Alene, as compared with the system provided in the application of the City for a loan and grant, "Plaintiff's Exhibit No. 1."

15. The Court erred in admitting evidence to the effect that an adequate Diesel engine generating plant would cost the sum of $368,790, computed as of November 1934, and to serve 80% of the load of said City would cost $597,200, and in over-ruling the objection of the appellants to the admission of such evidence, to which ruling appellants excepted.

16. The Court erred in admitting evidence to the

effect that an adequate distribution system for said City would cost the sum of $195,005, as of the month of November 1934, and in over-ruling the appellants' objection to such evidence, to which ruling the appellants excepted.

17. The Court erred in admitting any evidence with respect to the cost of a Diesel engine generating plant or the cost of a distribution system in the City of Coeur d'Alene, to which evidence the appellants objected on the ground that it was an attempt to interfere with the administrative functions of the executive departments of the Government, and in over-ruling such objection, to which ruling the appellants excepted.

18. The Court erred in finding that under the proposed contract between the City of Coeur d'Alene and the Federal Emergency Administration of Public Works, the City of Coeur d'Alene attempted to delegate to the Federal Emergency Administration of Public Works powers vested in it by the State of Idaho.

19. The Court erred in finding that the approval of the application of the City of Coeur d'Alene for the loan and grant was not for the purpose of relieving unemployment, and that the relief of unemployment will not be accomplished to any extent thereby, but that the purpose of said loan and grant is to enable the city to construct a competing plant or require the appellee to reduce its rates 20% lower than as fixed by the Public Utilities Commission of the State of Idaho, and that said loan and grant, if made, will be because of refusal or failure of appellee to accede to the demands of the Federal Emer-

gency Administrator of Public Works, to fix and regulate rates, charges and services of the appellee.

ARGUMENT

APPELLEE HAS NO STANDING TO QUESTION THE VALIDITY OF THE LOAN AND GRANT AGREEMENT OR THE CONSTITUTIONALITY OF TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT, BECAUSE IT WILL SUFFER NO DIRECT LEGAL INJURY.

It is a settled rule that before a party may challenge the constitutionality of an act of Congress, he must show that the act threatened thereunder will cause direct and legal injury and will adversely affect his legal rights.

In MASSACHUSETTS v. MELLON 262 U. S. 447, (FROTHINGHAM v. MELLON), in response to an attack upon the constitutionality of an act of Congress, the Supreme Court said:

> "The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. * * * We have no power *per se* to review and annual acts of Congess on the ground that they are unconstitutional. *That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justifiable issue, is made to rest upon such an act.* Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which

otherwise would stand in the way of the enforcement of a legal right. *The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement,* and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

In the recent decision of the Supreme Court on the Agricultural Adjustment Act, it was held that the decision in Massachusetts v. Mellon, *supra,* did not prevent a taxpayer from attacking the constitutionality of the law, but in the opinion the Court said:

"That case might be an authority in the petitioners' favor if we were here concerned merely with a suit by a taxpayer to restrain the expenditure of the public moneys."

"It was there held that a taxpayer of the United States may not question expenditures from its treasury on the ground that the alleged unlawful diversion will deplete the public funds and thus increase the burden of future taxation. Obviously the asserted interest of a taxpayer in the federal government's funds and the supposed increase of the future burden of taxation are minute and undeterminable. But here the respondents who were called upon to pay money as taxes resist the exaction as a step in an unauthorized plan. This circumstance clearly distinguishes the case."

United States vs. Butler, ... *U. S.* ....., 80 Law Ed. Advance Opinions 287.

"It has been repeatedly held that one who would strike down a State statute as violative of the Federal Constitution must show that he is within the

> class of persons with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him. (Citing cases.) In no case has it been held that a different rule applies where the statute assailed is an act of Congress nor has any good reason been suggested why it should be so held."
>
> *Heald v. District of Columbia,* 259 U. S. 114
> *Fairchild v. Hughes* 258 U. S. 126.

The appellee contends, and the Court found that the construction of a competing municipal plant in the City of Coeur d'Alene will materially affect the value of the property of the appellee within the City, and the value of its franchise, and that the construction of said municipal plant will result in a direct and serious injury to the property and franchise of the appellee. (R.p. 257.)

This result could happen without the making of a loan and grant by the Federal Emergency Administration of Public Works, or any action of the United States or its officers. Appellee has no legal monopoly of the electric utility business in Coeur d'Alene. Its franchise is not exclusive. (R.p. 98).

The City of Coeur d'Alene has the legal right under the Constitution and laws of the State of Idaho to construct and operate its own municipal lighting system. It is not required to secure a certificate of convenience and necessity from the Public Utilities Commission before constructing such a system, as municipal corporations are expressly excepted from such requirement by the provisions of Section 59-104, Idaho Code Annotated, which reads as follows:

> "59-104. The term "corporation" used in this act includes a corporation, a company, an association and a joint stock association, but does not include a municipal corporation . . ."

In construing this section, the Supreme Court of Idaho has held that municipally owned utilities are not under the jurisdiction of the Public Utilities Commission.

Kiefer v. City of Idaho Falls 49-Ida. 458, 289, Pac. 81

Manifestly the construction and operation of a municipal light plant and distribution system by the City of Coeur d'Alene can not result in a legal injury to appellee since the City will be doing only what it has a lawful right to do. The injury which may result to appellee through the construction and operation of a competing municipal electric plant will result solely from the fact that such a plant is physically constructed and operated, and not because the funds for its construction are obtained from any particular source. The source of the funds is merely incidental.

It is the public policy of the State of Idaho to permit its cities and villages to own and operate their own municipal light and water systems. The legislature has not enacted any statutes restricting such rights. On the contrary, the legislature has encouraged municipally owned light and water plants by removing the limitations on the amount of indebtedness which can be incurred for such purposes so long as the constitutional requirements are complied with. Private owners of public utilities in the State of Idaho are not protected from competition by

municipal plants. The risk of competition from a municipally owned plant is inherent in the nature of the business in which the appellee is engaged.

TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT IS CONSTITUTIONAL.

The subject matter of the act is within the provisions of Article I, Section 8 of the Constitution of the United States, which provides:

> "Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States;
> * * * * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The title to the National Industrial Recovery Act reads as follows:

> "An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes."

The declaration of Policy declared in Section 1 of Title I of the Act reads as follows:

> "Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign com-

merce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Title II of the act is entitled "Public Works and Construction Projects." The provisions of the first section of Title II (Section 201) authorize the President to create a Federal Emergency Administration of Public Works to "effectuate the purposes of this title," and provide that all the powers of the "Administration" so created shall be exercised by a Federal Emergency Administrator of Public Works. The President is empowered to establish such agencies as he may find necessary, and to delegate any of his functions and powers under Title II to such officers, agents and employees as he may designate or appoint.

Pursuant to this authority, the President has created the Federal Emergency Administration of Public Works, and has delegated to the Administrator sufficient of his

functions and powers under the Act to enable him to execute the law.

Under the Provisions of Section 202 of Title II of the Act, the Administrator, under the direction of the President, is commanded to prepare a comprehensive program of public works which shall include among other things, the various types of projects therein enumerated.

It appears from the above and other provisions of the Act, that by Title II of the National Industrial Recovery Act, the Congress found and declared the following (among others) to be national purposes:

1. The preparation of a comprehensive program of public works, co-extensive with the boundaries of the United States, and including not only the several States but also Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

2. A prompt increase of employment by means of Federal construction or Federal aid in financing the construction of projects included in the comprehensive program of public works prepared by the Administrator pursuant to the mandate of the Act.

3. The promotion of the thirty-hour week and consequent spreading of employment.

4. Increasing purchasing power by requiring the payment of just and reasonable wages.

5. Preference for veterans in the employment of labor on the public works projects.

Since the recent decision of the Supreme Court of the United States in *United States v. Butler, decided January, 6, 1936 ..... U. S. ....., 80 Law Ed. 287*, the power of Congress to authorize expenditure of public moneys for purposes other than those directly enumerated in the Constitution is no longer an open question. In the opinion the Court said:

> "It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of the legislative power found in the Constitution." *U. S. v. Butler, supra.*

This decision disposes of the Finding and Conclusion of the lower Court that "Article I, Section 8, Clause 1 of the Constitution of the United States does not authorize Congress to levy taxes or appropriate money for objects not within the enumerated powers expressly delegated to the Federal Government." (R. p. 259.)

It also makes erroneous the view of the lower Court as stated in the opinion granting the temporary injunction, and afterwards accepted as the "law of the case" in which the Court stated "those powers enumerated were all with the view of the "Common Defense and General Welfare" and are parts of the sentence which embraced the whole of the eighth section of the firstArticle. Their objects cannot be stretched beyond the objects indicated in the enumerated powers granted by the Section." (R.p. 154).

The decision of the Supreme Court is also contrary to

the view expressed by the lower Court, in said opinion that "if Congress is not authorized to legislate upon a certain subject matter, then it would follow that it may not appropriate any money to carry out such unauthorized subject matter." (R.p. 159).

Title II of the National Industrial Recovery Act in authorizing loans and grants to the states and municipalities for constructing public works and projects provides for national as distinguished from local welfare.

The question as to the national purpose of the appropriation is to be determined, in the first instance, by Congress, and in determining what will provide for the national welfare, the discretion of Congress is not subject to review by the Courts. If the Courts possess the power to review the determination of Congress under any circumstances, it should be confined to a plain and palpable abuse. If the question is such that reasonable men may differ in their opinions, certainly no Court should set up its opinion against the opinion of Congress. It becomes a question of policy, and with legislative policy, the Courts have nothing to do. The Supreme Court said in *United States v. Butler, supra*, "This Court neither approves nor condemns any legislative policy."

At the time the National Industrial Recovery Act was passed general unemployment existed throughout the nation. Millions of our citizens were out of work and were dependent upon private charities and public relief for the necessities of life. Unemployment was not confined within the boundaries of any single State but was

national in its scope. Private agencies and local and state governmental agencies were no longer able to meet the widespread demand for relief. The purpose of Congress "to reduce and relieve unemployment" as stated in the Declaration of Policy set forth in Section 1 of Title I of the Act, was the primary purpose for the enactment of law. Senator Wagner, the member of the Committee in charge of the bill in the United States Senate stated:

> "Mr. President, the National Industrial Recovery Bill is an employment measure. Its single objective is to speed the restoration of normal conditions of employment at wage scales sufficient to provide a comfort and decent level of living."
> 77 Cong. Rec. 51-52, (1933).

"The rule that Congressional debates will not ordinarily be considered by a Court interpreting a Federal statute does not apply to remarks made by a member of the Committee in charge of the bill."

> *Binns v. United States*, 194 U. S. 486, 495, 27 Ops. Attorney Gen. (1908) 68, 78.

The conception of the project by the lower Court as shown by the opinion and findings appears to be limited to the proposed municipal electric plant in the City of Coeur d'Alene, standing separate and alone and viewed only by itself. The lower Court treats the project as if it were a single isolated project wholly unrelated to any program of public works. The lower Court said, "The Construction of a Diesel engine plant and light system in and to be used solely by the inhabitants of the City of Coeur d'Alene, would not in any way be for a national

purpose and to assert under the facts in the bill that its construction would relieve unemployment, and that an emergency existed does violence to the English language." (R.p. 159).

It is from this narrow viewpoint that the legal principles involved in the case were applied. The lower Court applied them to the Coeur d'Alene project as if it were the only municipal electric plant included in the comprehensive program to be financed by the Federal Emergency Administration of Public Works.

The true conception of the subject is that the Coeur d'Alene project is only one of the many thousands of similar projects scattered throughout the length and breadth of the land. It is but a small part of the comprehensive program of public works authorized by the National Industial Recovery Act and prepared by the Federal Emergency Administrator of Public Works for the purpose of effectuating the purposes of the law.

If we consider the Coeur d'Alene project from the proper point of view, we see first a broad comprehensive national program of public works designed to reduce and relieve unemployment, and to rehabilitate industry, and we then see the Coeur d'Alene project as one of the units in the general plan, which with thousands of similar units make up the comprehensive program contemplated by the law. The Coeur d'Alene project when viewed by itself is local in character, but when viewed as an integral part of a comprehensive plan and program, it is national in scope and character.

The question is how will the comprehensive program affect the nation as a whole, and not what will be accomplished in the City of Coeur d'Alene. Will the national program of public works, of which this project is a part, assist in reducing and relieving unemployment throughout the nation, and will it help to rehabilitate industry? If it appears reasonable that such results may be accomplished nationally, it is unimportant whether or not the Coeur d'Alene project will directly relieve unemployment locally.

The relief of unemployment is a national purpose—one which has to do with the prosperity, the growth, the honor and peace and dignity of the nation. With more than ten million of its citizens out of work and on relief, no country can be prosperous—it cannot continue normal growth. Such a condition reflects upon the honor and dignity of the nation and may even thereaten its peace. Hunger and destitution will in time undermine the foundation of the government—the loyalty and patriotism of its citizens—upon which the existence of the nation depends.

The purpose of the National Industrial Recovery Act was to relieve national unemployment. The loan and grant of the federal funds to the City of Coeur d'Alene is one of the means adopted to carry out that purpose. The construction of the municipal electric plant is incidental to the main object sought to be accomplished. It is merely one link in the chain of public works comprising the comprehensive program. The relief of unemployment

became a national problem. It is common knowledge that the burden of relief became too great even for the states to handle. Congress could not ignore this condition and the Court should not ignore it.

"To do this would be to shut our eyes to what all others than we can see and understand."

> Child Labor Tax Case (*Bailey v. Drexel Furniture Co.*) 259 U. S. 2037,
>
> *United States v. Butler, Supra*, p. 293.
>
> "Does Title II of the National Industrial Recovery Act, in authorizing loans and grants to the States and municipalities for constructing public works or projects, provide for the "general welfare" as we have construed these words in the Constitution?"
>
> "That is a question to be determined in the first instance by Congress, and in determining what will provide for the general welfare, Congress must be accorded wide discretion. With its determination the Courts may not interfere unless it clearly and indubitably appears that the purpose for which a tax is to be laid, collected and appropriated is not within the limitations fixed by the Constitution."
>
> *Kansas Gas and Electric Company v. City of Independence, Kansas*, 79 Fed. (2nd) 32.
> *Greenwood County, S. C. v. Duke Power Co.*
> ..... Fed. Suppl. .....

TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT IS NOT AN UNCONSTITUTIONAL DELEGATION OF THE LEGISLATIVE POWER OF CONGRESS TO THE PRESIDENT.

Appellee contended in the Court below that in so far as Title II of the National Industrial Recovery Act empowers the President and the Administrator to determine the projects to be included in the comprehensive program of public works, it is an unconstitutional delegation of

legislative power and relied upon the decisions of the Supreme Court of the United States in *Panama Refining Co. v. Ryan,* 293 U. S. 388, 55 S. C. T., 241, 79 L. Ed. 446, and *Schechter v. United States,* 295 U. S. 495, 55 S. C. T., 837, 79 L. Ed. 1570, in support of its position.

In *Panama Refining Co. v. Ryan supra,* the Supreme Court held that Section 9 (c) of Title I of the National Industrial Recovery Act was an unconstitutional delegation of the legislative power to the President. In construing the section and defining the power which was delegated to the President, the Court said:

> "The section purports to authorize the President to pass a prohibitory law."
>
> "The question whether that transportation shall be prohibited by law is obviously one of legislative policy."
>
> "So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonable."
>
> *Panama Refining Co. V. Ryan, supra.*

In *Schechter v. United States, supra,* the Supreme Court held that Section 3 (a) of Title I of the National Industrial Recovery Act was an unconstitutional delegation of legislative power to the President in authorizing the approval of codes of fair competition having the effect of laws.

The Supreme Court construed section 3 (a) of Title

I of the Act, and the power therein delegated to the President as a legislative power to authorize the making of prohibitory laws through the adoption and approval of codes having standing as penal statutes. The Court stated in the opinion:

> "But the statutory plan is not simply one for voluntary effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities. It involves the coercive exercise of the law-making power. The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes."
>
> "We think the conclusion is inescapable that the authority sought to be conferred by section 3 was not merely to deal with "unfair competitive practices" which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of law which would embrace what the formulators would propose, and what the President would approve or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction, and development, according to the general declaration of policy in section 1. Codes of laws of this sort are styled "codes of fair competition."
>
> "The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot

delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

"And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country."

Schechter v. United States, supra.

The powers delegated to the President by section 3 (a) and section 9 (c) of Title I of the National Industrial Recovery Act were expressly held by the Supreme Court to be the power to make prohibitory laws by executive orders or by the approval of codes of fair competitive orders or by the aprpoval of codes of fair competition were penal statutes and violations thereof were made punishable by fines and imprisonment.

Thus, it is apparent that by the provisions of the recovery act which were condemned in each of the cases above cited, the Congress attempted to delegate to the President the power to make laws. Is it to be wondered at that the Supreme Court says that "Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies." On the contrary, it seems that no other decision could have been rendered under our constitutional system.

We do no question the soundness of the views expressed by the Supreme Court in the cases cited, but we contend that they have no application to Title II of the National

Industrial Recovery Act or to the state of facts involved in this case. The general expressions contained in the opinions in the cited cases are not to be extended beyond the questions therein discussed and decided. In this connection it is well to call attention to the opinion of Chief Justice Marshall in the case of *Cohen v. Virginia,* 6 Wheat. 264, 399, 5 L. Ed. 257, 290, in which a similar situation was presented in respect of certain general expressions in the opinion in *Marberry v. Madison.* The Chief Justice, in commenting on the opinion in the Marberry case, said:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."
>
> *Cohen v. Virginia, supra.*
>
> *Rathbun v. United States,* (*Humphrey v. United States*) 295 U. S. 602.

In the Rathbun case it was contended that a decision by the Supreme Court in *Myers v. United States,* 272 U.S. 52, 71 L. Ed. 160, recently decided and fully reviewing the general subject of the power of executive removal, was controlling, the Court said that expressions occurred in the course of the opinion of the Court in that case

which tended to sustain the government's contention, but held that they were beyond the point involved and cited with approval that portion of the opinion of Chief Justice Marshall in *Cohen v. Virginia, supra,* above quoted.

The statements made by the Court in the opinions in the cases relied upon by appellee relate to the delegation of power to the President to make prohibitory laws. They do not relate to the power of the President to spend money which has been appropriated by Congress. They do not relate to the power to select the individual projects to be included in the comprehensive program of public works for which the money is to be expended. The difference between the power to make prohibitory laws and other powers of a different nature was recognized by the Supreme Court in the Panama Refining Co. case when it said:

> "Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

"We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching the executive action. To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown."

And again in the Schechter case, the Court said:

"We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the Panama Ref. Co. case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."

Title I of the National Industrial Recovery Act relates to rules governing the conduct of individuals in their various lines of business. Since these rules are to have the effect of penal statutes, they are in effect laws. The power to make them is an exercise of the lawmaking power.

Title II of the National Industrial Recovery Act contains directions to the President and the executive department of the government relative to the expenditure of appropriations made by the Congress. Any agreements

made by the recipients of the government's bounty are voluntary agreements. In the case of municipalities, they can accept or reject the proffered funds at their pleasure. The rules and regulations governing the disbursement of the funds are provided for the orderly conduct of the program. They are not laws. No individual is compelled to obey them. Any obligation to conform to their requirements is voluntarily assumed.

The expenditure of money is an executive function. The Congress, in the exercise of its lawmaking power, has prescribed certain classes of projects which the executive department may finance with a view to providing employment quickly. The selection of the individual projects within these general classes is an administrative matter; it is not a legislative function.

The powers delegated to the President by Title II of the National Industrial Recovery Act are purely administrative. The President is charged with the duty of executing the law. The Congress completed the exercise of all essential legislative functions when it enacted the law.

The distinction between the power attempted to be conferred by section 3 (c) and section 9 (a) of Title I of the Act and those conferred by Title II is apparent, and is illustrated by the cases cited in the opinion in Panama Refining Co. case in which the difference between legislative functions and executive actions is pointed out.

Thus, in *Buttfield v. Stranahan,* 192, U. S. 470, an

Act of Congress was upheld which authorized the Secretary of the Treasury, upon the recommendation of a board of experts to "establish uniform standards of purity, quality and fitness for the consumption of all kinds of tea imported into the United States and to exclude from importation such teas as would not satisfy these requirements." In sustaining the constitutionality of this Act, the Supreme Court said: "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave the executive officials the duty of bringing about the result pointed out by the statute."

In *Union Bridge Co. v. United States,* 204 U. S. 364, 386, where the Secretary of War was given authority to determine whether bridges and other structures constituted unreasonable obstacles to navigation and to remove such structures, it was held that by the statute the Congress had declared "a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule."

In *Federal Radio Commission v. Nelson Bros. Bond and Morg. Co.* 289 U.S. 266 the Court, in construing the provisions of the Radio Act, held that the standard set-up was not so indefinite "as to confer an unlimited power."

In *Field v. Clark,* 143 U. S. 649, it was contended that the statute involved was an unconstitutional delegation of legislative power, but the Court held that "what the President was required to do was merely in execution of the Act of Congress," and this statement was approved

in the later case of *J. W. Hampton, Jr. and Co., v. United States,* 276 U. S. 394, in which the constitutionality of section 315 of the Tariff Act of September 21, 1922, was involved. This Act delegated power to the President of the United States to change rates under flexible tariff provisions. In upholding the constitutionality of the Act, the Court said:

> "The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute, and directing details of its execution, even to the extent of providing for penalizing a breach of such regulations."

In the opinion of the Court delivered by Mr. Chief Justice Taft, the following statement from the case of *Cincinnati, Wilmington and Zanerille R. R. Co. v. Commissioners,* 1 *Ohio St.* 77, 88, was quoted with approval:

> "The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

The Supreme Court has upheld the delegation of power to exercise discretion in the carrying out of a congressional act in the following cases:

St. Louis Iron Mt. & So. Ry. v. Taylor, 210 U. S. 281, in which the Interstate Commerce Commission was auth-

orized to designate standard height and maximum variation of drawbars for freight cars.

United States v. Grimaud, 220 U. S. 506, in which the Secretary of Agriculture was given power to prescribe regulations for use of national forest reservations.

Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S. 194, in which the Interstate Commerce Commission was authorized to require carriers to keep accounts in specified manner.

It is clear from a review of the decisions of the Supreme Court that the cases in which the delegation of legislative powers to the executive has been held unlawful are those where the conduct of individuals is sought to be regulated by executive orders or departmental rules, or private rights have been affected. In none of the cases has the Court held that the making of expenditures is an unconstitutional delegation of legislative power.

Section 212 of Title II of the Act provides that "the Administrator, under the direction of the President shall prepare a comprehensive program of public works, which shall include 'the several classes of public works enumerated in sub-sections (a), (b), (c), (d), and (e),' thereof."

Section 203 of Title II of the Act authorizes and empowers the President, through the Administrator or through such other agencies as may designate or create "with a view to increasing employment quickly," to make reasonably secured loans to carry out any public works

project included in the program, and to make grants to states, municipalities or other public bodies for the construction, repair or improvement of any such project.

Section 206 of Title II of the Act prescribes the provisions to be included in the contracts for loans and grants.

The standard for the program of public works is laid down in Section 202. The project involved in this case falls within a specifically enumerated class.

The standards as to the projects which may be financed or aided by loans or grants are laid down in Section 203 and 206. They must be public works projects included in the program prepared pursuant to Section 202. The loan or grant must be made with a view to increasing employment quickly, and the loans must be reasonably secured.

Under such a program of public works as was designed by Section 202, it was not practicable for Congress to specify particular projects or determine what loans or grants should be made for particular projects. This required investigation and the exercise of administrative discretion.

The term "authorize and empower" was a direction to the President to select from the different classes of projects specifically designated in Section 202, the particular ones within the limitations specified best calculated to carry out the purpose of the Act.

The Act should be construed as implying a direction to the President to carry out and effectuate its purposes, and to make loans and grants within the limits of a reasonable discretion for projects within the classes included in the program.

The Congress may delegate any nonlegislative power which it may itself lawfully exercise. It does not necessarily follow from the fact that the power delegated was one which the Congress itself might rightfully exercise, that it was a legislature power or one which could not constitutionally be delegated.

"Congress may certainly delegate to others powers which the legislature may rightfully exercise itself . . . the line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest in which a general provision may be made and power given to those who are to act under the general provisions, to fill up the details."

Wayman v. Southard 10 Wheat (U.S.) 1, 6 L. Ed. 253
Greenwood County, S. C. v. Duke Power Co.
..... Fed. Suppl. .....

THE LOAN AND GRANT IS NOT IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In its conclusions of law, Nos. VI, VII and VIII, the lower Court held that the loan and grant to the City of Coeur d'Alene is in violation of the Tenth Amendment to the Constitution of the United States. (R.p. 260). The

conclusions are based upon Finding of Fact No. XXV to the effect that the grant and loan, if made, will be because of the refusal or failure of the appellee to accede to the demands of the Federal Emergency Administrator of Public Works to be permitted to fix and regulate rates, charges and services of the plaintiff as a public service corporation engaged in intra state business in the State of Idaho. (R. p. 256), and the administrative methods adopted by the Administrator as a basis of selection for making such loans and grants.

That the Court may not review the exercise of the administrative discretion imposed on officers of the government by acts of Congress, has been decided in many cases which will be cited in this brief in the support of the proposition that judicial discretion may not be substituted for executive discretion.

The fact that the administration of the recovery act affects matters not directly subject to the control of Congress, such as a reduction of rates by private companies through municipal competition, cannot affect the validity of the Act if its broad purpose lies within the power of Congress.

United States v. Chandler-Dunbar Co.,
229 U. S. 53.

Alabama Power Co. v. Gulf Power Co.,
283 Fed. 606, 613.

Walters v. Phillips,
284 Fed. 237.

Alabama v. United States,
38 Fed. (2d) 897.

Greenlee Bay Canal Co. v. Patton Paper Co.
172 U. S. 58.

Interstate Commerce Commission v. Brimson,
154 U. S. 447,

Northern Securities Co. v. United States,
193 U. S. 197.

Smith v. Kansas Title and Trust Co.
255 U. S. 180.

The purpose of the Tenth Amendment was to prevent the invasion of the reserved rights of the states by the Federal Government. It was not designed to prevent the States and their political subdivisions, including municipalities, from voluntarily accepting aid or assistance from the Federal Government. As a condition to granting such aid or assistance, the Federal Government may impose limitations, requirements or conditions, and that is exactly what it has done in this case and nothing more. The City of Coeur d'Alene does not have to accept the loan and grant or either of them. If, however, it desires to accept them, it must be on the conditions imposed by the administrator. The City of Coeur d'Alene is willing to accept the loan and grant subject to the conditions imposed, and if there was ever any doubt as to its lawful right to do so that doubt has been removed by Chapter 2 of the Laws enacted at the Extraordinary Session of the Idaho Legislature held in 1935, immediately following the adjournment of the regular session (1935 Session Laws, Extraordinary Session, p. 6).

This Act provides that every municipality shall have power and is hereby authorized:

"(a) to accept from any Federal agency

grants for or in aid of the construction of any public works project.

(b) to make contracts and execute instruments containing such terms, provisions and conditions as in the discretion of the governing body of the municipality may be necessary, proper or advisable for the purpose of obtaining grants or loans, or both from any Federal agency pursuant to or by virtue of the Recovery Act; to make all other contracts and execute all other instruments necessary, proper or advisable in or for the furtherance of any public works project and to carry out and perform the terms and conditions of all such contracts and instruments.

(c) to subscribe to and comply with the recovery act and any rules and regulations made by any federal agency with regard to any grants or loans, or both, from any federal agency.

(d) to perform any acts authorized under this act, through, or by means of its own officers, agents or employees, or by contracts with corporations, firms or individuals.

(e) to award any contract for the construction of any public works project or part thereof upon any date at least fifteen days after one publication of a notice requesting bids upon such contract in a newspaper of general circulation in the municipality.

(f) to sell bonds at private sale to any federal agency without giving public advertisement.

* * * * * * * *

(j) to exercise any power conferred by this act for the purpose of obtaining grant or loan or both, from any federal agency pursuant to or by virtue of the recovery act, independently or in conjunction with any other power or powers conferred by this Act or heretofore or hereafter conferred by any other law.

(k) to do all acts and things necessary or convenient to carry out the powers expressly given in this act."

The law is a declaration of legislative policy and demonstrates conclusively that it is the public policy of the State of Idaho to permit and encourage municipalities to avail themselves of the loans and grants provided by the Federal Government.

It is also the public policy of the State of Idaho to permit and encourage municipalities to acquire and operate muncipal light and water systems. Not only is there no statute restricting the exercise of such right, but the limitation imposed on muncipalities in incurring indebtedness for other purposes is removed so far as light and water systems are concerned. The statutory limitation of bonded indebtedness in other cases does not apply to the bonded indebtedness for such systems.

Municipal corporations in Idaho are expressly excepted from the jurisdiction of the Public Utilities Commission by Section 59-104, Idaho Code Annotated, which reads as follows:

> "59-104. The term "corporation" when used in this act includes a corporation, a company, an association and a joint stock association but does not include a muncipal corporation . . ."

In construing this section, the Supreme Court of Idaho has held that municipally owned utilities are not under the jurisdiction of the Public Utilities Commision.

Kiefer v. City of Idaho Falls,
49 Ida. 458, 289 Pac. 81.

Under Section 203 (a), the President is authorized

and empowered through the Administrator to make loans and grants to finance or aid in financing any public works projects included in the program under the provision of Section 202. The loans are to be reasonably secured and the grants are to be made upon such terms as the President shall prescribe.

The Act contemplates that any loans made by the United States to municipalities shall be reasonably secured and it also contemplates that the President shall impose such terms as he deems proper as a condition to the making of the grant. Both loans and grants are to be made upon conditions which must be determined by the executive.

In *United States v. Butler, supra,* the Supreme Court held the Agricultural Adjustment Act invalid on the ground that it invades the reserved rights of the states, but the Court recognized that the appropriation of money can be coupled with conditions regulating its expenditure, stating in the opinion:

> "We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with, the appropriation shall no longer be available. By the Agricultural Adjustment Act, the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. There is an obvious difference between a statute stating the conditions upon which money shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."
>
> *U. S. v. Butler, supra.*

The loan and grant agreement involved in this case contains certain conditions precedent to the government's obligations to make the loan and grant including the condition that the City shall adopt a rate and bond ordinance satisfactory to the Administrator in form, sufficiency and substance. (R.p. 118).

In making provision to reasonably secure the loan, the administrator had the right to consider the effect of the rates to be charged by the City on the adequacy of the security. It was within his province to consider any maters which in his judgment would have a bearing upon the security for the loan. It is quite possible that the bonds evidencing the loan would be better secured if lower rates are established as that may be necessary to enable the City to obtain a sufficient amount of the business to operate the electric system economically. It is not an unreasonable condition arbitrarily imposed by the Administrator upon the municipality to regulate its rates, but is a necessary precaution to insure the success of the project and thereby reasonably secure the loan.

The loan and grant agreement embraces all the terms of the contract between the United States and the City. The conditions contained in the so-called release of the Federal Emergency Administration of Public Works (R. p. 53-57), and in the letter of November 21, 1934, to the Mayor of Coeur d'Alene, (R. p. 67-68) are not included in the contract and are not binding on the City. The conditions contained in the letter to the effect that the rate ordinance should state that the rates will not be increased

unless approved by the Adminsitrator, is not a part of the contract, and such a provision in the ordinance would be void and unenforceable.

With reference to the practice of giving the private utility an opportunity to put lower rates into effect, it is a distortion of the facts to say that this policy is prejudicial to the private utility company. It is a concession made to the private utility company to avoid the government financing of a municipally owned plant if it desires to take advantage of it. The private utility company is not injured by having the opportunity to establish lower rates and thereby prevent the installation of a competing system financed by the government. It is a policy designed to protect existing privately owned systems against the competition of municipally owned plants if they see fit to furnish electricity at rates as low as the rates of the municipality.

The reduction of rates by the private utility operating the existing plant in the municipality is not in any sense a condition to the makng of the loan and grant. It is merely an exception to the general plan of government financing of municipal projects and is a favor extended to the private utility company if it sees fit to accept it.

The matter of rates is a detail in the administration of the program for the construction of public works projects. It can not be successfully contended that the relief of unemployment is not the primary object of the program merely because as an incident in the administration thereof, the reduction of rates for electricity is deemed

necessary or desirable to reasonably secure the loan or to prescribe the terms of the grant.

It is the province of the President, acting through the Administrator, in the exercise of a reasonable discretion, to determine what requirements are necessary to reasonably secure the loans, and what conditions shall be prescribed for the making of the grant. The motives actuating the executive in the determination of such matters are not the subject of judicial inquiry.

In the case of *Dakota Cent. Teleph. Co. v. South Dakota*, 250 U. S. 163, 182, 184, the Supreme Court said that the contentions made in the case assailed the motives which it is asserted induced the exercise of power by the President, and then stated in the opinion:

> "But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves conditions which are beyond the reach of judicial power. This must be, since, as this Court has often pointed out, the judicial may not invade the legislative, or executive department so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

In *United States v. Chemical Foundation*, 272 U. S. 1, 14, 15, the Supreme Court said that presumption of regularity supports the official acts of public officers, and in the absence of clear evidence to the contrary the courts presume that they have properly discharged their duties, and stated in the opinion:

> "Under that presumption it will be taken that

Mr. Polk acted upon knowledge of the material facts. The validity of the reason stated in the orders or the basis of fact on which they rest will not be reviewed by the Courts."

"Nor does the Federal Government by making loans and grants under this Act encroach on the soverign rights of the States. It does not enter the territorial limits of the States and there, through its own agencies or instrumentalities engage in a non-federal activity. It simply advances funds by loans and grants to States and their agencies to carry out their powers to construct public projects for the purpose of promoting the general welfare of the United States."

Kansas Gas and Electric Company v. City of Independence Kansas, 79 Fed. (2nd) 32.

THE ADMINISTRATIVE DISCRETION OF THE EXECUTIVE DEPARTMENT IS NOT SUBJECT TO JUDICIAL REVIEW.

In the trial of this case, over the objection of appellants, the lower Court received evidence with respect to the adequacy and cost of the proposed municipal electric plant and made Findings based on such evidence to the effect that the proposed plant is not adequate and that the cost of an adequate system would exceed the funds provided therefor. (R.p. 250-251).

Appellants contend that these matters were not proper subjects for judicial inquiry, and that the Court improperly interefered with the administrative functions of the executive department of the government.

The application of the City of Coeur d'Alene to the Federal Emergency Administrator of Public Works for the loan and grant in controversy in this case (Plaintiff's

Exhibit No. 1, R. p. 433) was accompanied by an engineer's report (R. p. 446) containing an estimate of the cost of the proposed system. The application states that it has been prepared and the data is presented in accordance with Circular No. 2, of the Federal Emergency Administration of Public Works, issued under date of August 1, 1933, outlining the information required with application for loans to municipalities and other public bodies. Included in the information required is an estimate of the cost of the project (R. p. 476).

Circular No. 1 issued by the Federal Emergency Administration of Public Works (Plaintiff's Exhibit No. 3, R. p. 457), among other things, outlines the procedure for the consideration of applications from municipalities for loans and grants, including an examination by a State engineer appointed by the Administrator, and a recommendation by a State Advisory Board. (R. p. 472-473). When all needed information has been supplied, the application is to be listed for final examination, and upon completion of the examination, the engineer is to submit the application to the Board and the Board to the Administrator with its recommendation. (R. p. 473).

The report of the engineer was prepared to accompany the application for the loan and grant. (R. p. 390-391). Its purpose was solely for use with the application. (R. p. 415). It was a preliminary plan compiled and prepared to comply with the regulations of the administration as given out by its published information. (R. p. 391). It was not prepared as the final plan or detailed specifica-

tions of the project. (R. p. 415). Since the application was approved and the loan and grant authorized, it necessarily follows that the application and the engineer's report were both sufficient in form and substance to satisfy the Federal Emergency Administration of Public Works.

At the time this suit was filed and further proceedings to consummate the loan and grant were enjoined, the project had not yet reached the stage for the preparation of the final plans and detailed specifications. (R. p. 416). Consequently the final costs of the project had not been finally determined either by the Federal Emergency Administrator of Public Works, or by the City of Coeur d'Alene, and could not be determined until the final plans and detailed specifications had been prepared. With the proceedings pending at this stage before the Executive Department, at the time of the trial, the Court received evidence as to what the project would actually cost and made findings on that subject. Also evidence was received and findings made with respect to the adequacy of the project. This was an interference with the Executive Department in the exercise of its administrative discretion. The rulings of the Court admitting this evidence over the objecton of the appellants were erroneous and the findings were improperly entered.

> "Courts will not interfere with ordinary functions of executive departments of government."
>
> *Fish v. Morganthau*, 10 Fed. Supp. 613.
>
> "It is equally plain that such perennial powers lend no support whatever to the proposition that we may under the guise of exerting judicial power,

usurp mere administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been widely exercised."

"Indeed, the arguments just stated and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

Interstate Commerce Commission v. Illinois C. R. Co., 55 L. Ed. 280.

An interesting case is "Honolulu Rapid Transit and L. Co., v. Hawaii," 53 Law Ed. 186. The appellant, the Street Railway Company, had been running cars at intervals of ten minutes and proposed to discontinue the schedule and establish one with longer intervals, and had applied to the superintendent of public works for permission to put into effect the proposed schedule. By a statute, regulation of such matters was left to the Superintendent of Public Works with the approval of the Governor. However, the Attorney General brought a suit in equity, seeking an injunction to prevent the company running the cars at less frequent intervals than ten minutes, alleging that the convenience of the public required the maintenance and continuance of the ten minute schedule. Evidence was taken, and an injunction issued against the change. The Supreme Court said:

"But the action of the Court below went much farther than this, and farther than as warranted by any decision which has been called to our attention. In the absence of a more specific and well defined duty than that of running a sufficient number of cars to meet the public convenience, the Court, in this case, inquired and determined, as a matter of fact, what schedule the public convenience demanded on particular streets, and then, in substance and effect, compelled a compliance with that schedule. And this was done, though, as will be shown, the full power to regulate the management of the railway in this respect was vested by the statute in the executive authorities."

The Court then proceeds to illustrate the effects of non-observance of the powers between the judicial and legislative field.

See 12 Corpus Juris, Constituional Law, Section 393, P. 894.

"An official to whom public duties are confided by law, is not subject to the control of the courts, in the exercise of the judgment and discretion which the law reposes in him as part of his official function."

"This doctrine is as applicable to the writ of injunction as it is to the writ mandamus."

Gaines v. Thompson, 19 Law Ed. 62.

"If the matter in respect to which the action of the official is sought, is one in which the exercise of either judgment or discretion is required, the Courts will refuse to substitute its judgment or discretion for that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the orderly functions of government."

Louisiana v. McAdoo,
234 U. S. 627, 58 Law Ed. 1506.

> "It has been settled from the adoption of the Constitution of the United States, dividing the powers of Government into three departments, that the judiciary cannot properly interfere with executive action when the executive officer is authorized to exercise his judgment or discretion; that it is only in cases where the executive officer has to perform a purely ministerial act that the Courts, either by proceeding in mandamus or injunction, can direct or control the performance of such act."
>
> *Dudley v. James*, 83 Fed. 345.

It has been repeatedly held by the Supreme Court that the exercise of the administrative discretion reposed in officers of the Government by acts of Congress, is not subject to judicial review in the absence of palpable abuse.

Houston v. St. Louis Independent Packing Co., 249 U. S., 479; City of New Orleans v. Payne, 147 U. S. 261; Interstate Commerce Commission v. Chicago & Alton Ry. Co., 215 U. S., 479; Johnson v. Drew, 171 U. S., 93; Decatur v. Paulding 14 Pet. 497, 10 L. Ed. 599; Burfening v. Chicago etc. Ry. Co., 163 U. S. 321; Smith v. Hitchcock 226 U. S. 53.

The inquiry into the costs of the construction of the system was premature. The final costs are conjectural. The findings in this respect were necessarily based upon the assumption that if the City could not construct the plant for the amount provided for after advertising for bids, it would proceed with the project and contract an indebtedness for a larger amount. Such an assumption is without jusification. The evidence does not tend to show that the City of Coeur d'Alene threatens to expend a

greater amount in the construction of a system than has been made available by the loan and grant. If it proves anything, it is that the City will construct with the money so obtained, an incomplete system. If such a conclusion is warranted from the evidence, it is a matter solely between the Federal Emergency Administrator of Public Works and the City.

Furthermore the evidence fixing the costs as of November, 1934, did not warrant the findings with respect to the actual costs of the construction of the system. The testimony is not undisputed that prices greatly increased between 1933 when the estimate of costs was made by the engineer for the City and November, 1934, when they were estimated by engineers for appellee. (R. p. 377). It is also undisputed that such increases were the results of codes under the N.R.A. Prices were increased after the code went into effect. (R. p. 375). The increases in prices resulted from an artificial condition created by the N.R.A. and the codes. This condition has ceased to exist. It necessarily follows that since the artificial condition which caused the increased costs no longer exists, it can not be assumed that the higher costs will continue. No presumption arises that higher prices will prevail when the plant is constructed. The costs of the plant can be determined when and only when bids are received. The conditions existing at that time will govern the costs. In the meantime, the estimate of costs contained in the engineer's report accompanying the application of the City for a loan and grant (Plaintiff's Exhibit No. 1 R. p. 446) should be accepted as the proper criterion since they were so ac-

cepted by the public works administration. The accuracy of the costs at the time the application was made has not been challenged. Estimates of the cost of construction are in a large measure matters of opinion based upon the type of construction which will be used after the final plans and detailed specifications have been made. The engineers testifying for appellee, selected a certain type of construction and the period of highest costs as the basis for their estimates. It was to the interest of appellee for them to use such a basis. It may fairly be assumed that their opinions as to costs were influenced in some degree at least by their interest in the case. All of them were either employees of appellee or the holding company of which it is a part, or its subsidiaries.

THE LOAN AND GRANT IS NOT IN VIOLATION OF SECTION 3 ARTICLE VIII OF THE CONSTITUTION OF IDAHO.

Conclusions of Law Nos. IX and X are to the effect that by entering into the loan and grant agreement, the City of Coeur d'Alene has incurred an indebtedness or liability exceeding the revenue provided for it for such year in violation of Article VIII Section 3 of the Constitution of the State of Idaho, and that the expenditures contemplated and proposed by the City exceed the funds authorized, together with the grant and create a liability against the City in violation of said constitutional provision. (R. p. 260-261).

Section 3 of Article VIII of the Constituion of Idaho, reads as follows:

> "3. Limitations on county and municipal indebtedness. No county, city, town, township, board of education, or school district, or other subdivision of the state shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: PROVIDED, That this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

The Court did not find and it is not contended that the requirements of said constitutional provision have not been complied with by securing the assent of two-thirds of the qualified electors of the City voting at an election held for that purpose and by providing for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same.

It therefore appears that the only basis for the findings is that the cost of the system will exceed the amount of the bonds authorized at the election.

The Constitutional provision above quoted has been construed by the Supreme Court of Idaho in the following cases:

Feil v. City of Coeur d'Alene, 23 Idaho, 32, 129 Pac, 643.

Miller v. City of Buhl, 48 Idaho, 668, 284. Pac. 843.

Straughan v. City of Coeur d'Alene, 53 Idaho, 494, 29 Pac. (2nd) 321.

In these cases the holding was to the general effect that the constitutional provision prohibits the incurring of a liability as well as a debt unless provision for payment is made as therein prescribed. In none of them is it held that a contract to expend money which has been made by grant to a municipality would come within the prohibition of that section of the Constitution.

The City of Coeur d'Alene is not anticipating the income or revenue for more than one year. The ordinance adopted by the City of Coeur d'Alene to provide funds with which to construct the power plant and distribution system called for a bond election to authorize the issuance of the bonds in the amount of $300,000. R. p. 91). The plan is to borrow from the federal government, a sum not to exceed $300,000. (R. p. 105). The government is to grant an additional amount equal to thirty percent of the cost of labor and materials. (R. p. 107). The City intends to spend for its plant and distribution system an amount not in excess of the loan and grant combined. The Court held that to provide for a plant costing in excess of $300,000, is to incur a debt or liability beyond the constitutional limitation, and that any contract entered into by the City to pay more than $300,000 violates the constitutional provision, even though the excess of

$300,000 which will be expended will be made by a grant from the federal government. (R. p. 165).

The money for the grant to the City has been appropriated and allocated and is available when and as the contract for the construction is let. So far as the City is concerned, this grant constitutes a part of the revenue provided for the year.

It is only an *indebtedness* or *liability* that falls within the condemnation of the constitutional limitations. An expenditure of money without the obligation of repayment is neither a debt or liability. It makes no difference how much the improvement costs if an indebtedness or liability does not arise from the transaction. The city is not prohibited from accepting a gift or grant, or from constructing any improvement at any cost if it can secure the funds for the project without incurring an indebtedness or liability to repay them.

We earnestly urge that the decree is erroneous and contrary to law and should be reversed.

Respectfully submitted,

W. B. McFARLAND

C. H. POTTS

Attorneys for Appellants, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and members of the City Council of said City of Coeur d'Alene, Idaho.